THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NO.20766 OF 2005

DISPOSED OF ON

BETWEEN:

M/S.MERLIN PROJECTS LTD.

HYDERABAD. … PETITIONER

AND

THE A.P.HOUSING BOARD,

HYDERABAD. … RESPONDENT

THE HONOURABLE SRI JUSTICE

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O R D E R :

1. The Andhra Pradesh Housing Board-respondent had proposed to develop a modern township project at Bandlaguda, Hyderabad city. Bids were invited in July, 2005. The petitioner had filed its bid in sealed cover for joint venture project on 25.8.2005. Several other bidders had also filed their bids. The financial bids were opened on 29.8.2005. However, the bid of the petitioner was not opened. The petitioner, on enquiry, learnt that the respondent had not treated the petitioner consortium as having financial eligibility in the evaluation and consequently the commercial bid of the petitioner was not considered. The petitioner made a representation dated 6.9.2005 contending that it satisfied the required financial eligibility for consideration of commercial bid on competitive basis. The refusal of the respondent to consider the petitioner's bid on competitive basis by treating the petitioner as having not satisfied the financial eligibility as envisaged under Cl.7.4.3 of the terms of the tender document, according to the petitioner, is arbitrary and illegal. Hence, this writ petition by the petitioner with a prayer to issue a Writ of Mandamus to consider the petitioner's commercial bid along with others on competitive basis.

2. The respondent filed counter affidavit. One D.S.Raju, Project Coordinator in the office of the respondent, has sworn to the counter affidavit. It is stated in the counter affidavit that Cl.7.4 of RFP documents pertains to financial eligibility evaluation. While evaluating financial eligibility of bidding consortium, Cl.7.4.2 and 7.4.3 are required to be read together. On a conjoint reading of Cls.7.4.2 and 7.4.3 it is clear that the petitioner did not fulfill financial eligibility criteria. The total turn over and worth of the individual members of the consortium put together cannot be taken into consideration. The financial eligibility evaluation is an essential term of the tender, which is a necessary pre-requisite for consideration of the bid. Paragraphs 5 and 6 of the counter affidavit need to be noted and they read as under:

" 5. I submit that prior to the submission of the tender, there was a

pre-bid meeting in the office of the Housing Board on 30.6.2005 at which point of time this specific query was put to us and we clarified this aspect of the matter even at that stage. I submit that a corrigendum to the RFP document was issued on 12.8.2005. While extending the time for submission of bid, in order to put the bidders to further and clear notice in view of certain doubts expressed during the pre-bid conference, we have again clarified this on 12.8.2005 in the corrigendum. A copy of the same is filed herewith. Under these circumstances, the contention of the petitioner is unsustainable either on facts or in law.

6 . Ground Nos.1 to 4 now raised by the petitioner are not sustainable. It is submitted that only the lead consortium member or if it so desires, subsidiary of the lead consortium member alone can be considered when the bidding is for a bidding consortium. It is submitted that the allegation of the petitioner that there has to be a collective assessment is not correct. The contention of the petitioner is based on misinterpretation and misreading of the terms of RFP document. It is submitted that as a matter of fact, there was no confusion as such a contention is not raised by any other bidder except the petitioner. It is further submitted that there is no anomaly and conflict with respect to assessing the financial eligibility of bidding consortium. Even on the technical front, the strength of only one technical consortium member was taken into account, in this case, the TCM is Ramky Infrastructure Ltd."

3. The petitioner filed reply affidavits, consequent on opening of the financial bids of the other two tenderers, contending that amount quoted by it is much more than the amounts quoted by the other two tenderers. The respondent-Board filed additional and supplementary counter affidavits.

4. Heard Sri.Vilas Afzulpurkar, learned senior counsel appearing for the petitioner and learned Standing Counsel appearing for the respondent-Board.

5. Learned senior counsel appearing for the petitioner contends that the petitioner-company satisfied the financial eligibility and therefore the action of the respondent in not opening the price bid of the petitioner is contrary to the conditions stipulated in RFP documents. He would further submit that the requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the conditions. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other case, it must be open to

the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. What he means to say is that total net worth of the consortium is to be taken into consideration for evaluating financial eligibility and not the networth of lead consortium member or subsidiary of the lead consortium member. In support of his submissions, he refers Cl.7.4 which deals with financial eligibility evaluation in RFP documents. He also placed reliance on the judgments of Supreme Court in PODDAR STEEL CORPN. V. GANESH ENGINEERING WORKS wherein it has been held as follows:

" 6. IT is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause No. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned. in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be. open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in G. J. Fernandez v. State of Karnataka, (1990) 2 SCC 488: (AIR 1990 SC 958), a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489 : (AIR 1979 SC 1628), but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses the present case belongs."

6. Per contra, learned Standing Counsel appearing for the respondent-Board submits that a pre-bid meeting was held on 30.6.2005 and accordingly a corrigendum to RFP documents was issued on 12.8.2005 and thereafter the petitioner submitted its tender. He would further submit that Cl.7.4 of RFP documents deals with financial eligibility evaluation according to which the strength of the Lead Consortium Member or if it so prefers, the Lead Promoter/ Subsidiary of the Lead Consortium Member shall be considered and on such evaluation, the tangible net worth of the lead consortium member of the petitioner is less than Rs.40.00 crores as on 31.3.2005 and the average turnover is less than Rs.65.00 crores per year in the last three years and therefore, the petitioner has not satisfied the financial eligibility and in which case opening of the price bid of the petitioner does not arise. It is also submitted by him that the terms of the invitation to tender prescribing the eligibility criteria are not subject to judicial review and that the High Court while exercising jurisdiction under Article 226 of the Constitution does not sit as a court of appeal. In support of his submissions, reliance has been placed on the decisions of Supreme Court in RAMANA V. I.A. AUTHORITY OF INDIA, CENTRE FOR PUBLIC INTEREST LITIGATION V. UNION OF INDIA, W.B.STATE ELECTRICITY BOARD V. PATEL ENGINEERING CO. DIRECTORATE OF EDUCATION V. EDUCOMP DATAMATICS LTD. KANHAIYA LAL AGRAWAL V. UNION OF INDIA and JESPAR I.SLONG V. STATE OF MEGHALAYA.

7. IT is well settled now that the courts can scrutinize the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by the Apex Court in TATA CELLULR V. UNION OF INDIA. After examining the entire case law the following principles have been deduced. (1) The modern trend points to judicial restraint in administrative action. (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise which itself may be fallible. (4) The terms of the invitation to tender cannot be open to judicial scrutiny

because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fide. (6) Quashing decision may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

8. The core issue in this writ petition is whether the petitioner-company satisfies the financial eligibility criteria. It is no more in dispute that a tender has been submitted by the petitioner-company as consortium. Cl.7.4 of RFP documents deals with financial eligibility evaluation, which reads as follows:

> " 7.4 **FINANCIAL ELIGIBILITY EVALUATION**
>
> The consideration for evaluation of the Eligibility Criteria i.e. the entities who would be eligible for evaluation is as follows:
>
> 1. For a Bidding Company
>
> For evaluation under the Financial Eligibility, the strength of the Bidding Company shall be considered.
>
> 2. For a Bidding Consortium
>
> For evaluation under the Financial Eligibility, the strength of the Lead Consortium Member or if it so prefers, the Subsidiary of the Lead Consortium Member shall be considered.
>
> 3. Criterion for Financial Eligibility
>
> The Bidding Company/Bidding Consortium, should, as per the audited financial results meet both the following minimum eligibility criterion as

detailed below:

1. Tangible Net worth not less than Rs.40 Crores as on 31.3.2005

And

2. Average Annual Turnover not less than Rs.65 Crores per year for last three years i.e. from 2002-03 to 2004-05.

Where audited financial statements are not available, unaudited results can be considered subject to that bidder continues to meet the eligibility criteria once audited results are available, before signing of the Agreement.

Where audited results for 2004-05 are not available, Networth for 2003-04 can be considered, provided bidder continues to meet eligibility criteria once audited results are available before RFP submission."

9. Learned Senior Counsel by referring Cl.7.4.3 submits that the total worth of members of consortium put together has to be taken into consideration to arrive at the financial eligibility criteria. Whereas it is contended by learned Standing Counsel appearing for the respondent-Board that the net worth or annual turn over of the lead consortium member or if it so prefers the subsidiary of the lead consortium is to be considered to arrive at the financial eligibility.

10. Undisputedly, a pre-bid meeting was conducted on 30.6.2005. Corrigendum to RFP documents came to be issued on 12.1.2005. The corrigendum reads as follows:

" CORRIGENDUM TO RFP DOCUMENTS

This corrigendum is being sent to all the Bidders who have purchased the RFP documents for either or both the sites of Bandlaguda and Warangal. The Bidders are required to make note of the below corrections to the RFP Documents. This corrigendum will henceforth be also construed to be part of the RFP documents.

1. Section 5.6- General Compliance Criteria

1. In case of Bidding consortium,

iii. The Technical Consortium Member would contribute not less than 11 % of the total equity in the Project Company. Bidding Consortium not complying with the above may be disqualified from further evaluation.

2. Section 5.7 – time table and Milestones

Last date for receipt of proposals and opening of cover 1 - 25.8.2005 at 3.00 P.M.

Completion of Evaluation - 2.9.2005.

3. Section 7.4.2 – Financial Eligibility Evaluation: for a Bidding Consortium

For evaluation under the Financial Eligibility, the strength of the lead Consortium Member or if it so prefers, the Lead Promoter/Subsidiary of the Lead Consortium member shall be considered."

11. The petitioner submitted tenders after the corrigendum. It is explicit from the corrigendum that the strength of Lead Consortium Member or if it so prefers, the Lead Promoter/Subsidiary of the Lead Consortium Member shall be considered for evaluating financial eligibility. Admittedly, either the lead consortium of the petitioner or one of the members of the consortium satisfies the financial eligibility criteria.

12. Learned senior counsel appearing for the petitioner strenuously contended that only three bids have been received by the respondent and of these three bids, the price bid of the petitioner is much more than the other two, and, therefore, opening of the price bid of the petitioner is beneficial to the respondent and more particularly in public interest. The question whether the bid offered by the petitioner is far higher than the bid of other two tenderers is relevant for the purpose of deciding the issue as to whether the petitioner's consortium satisfies the financial eligibility criteria. It is no more in dispute that neither Lead Consortium Member or any one of the members of the consortium individually satisfies the financial eligibility criteria.

13. In view of the above, the action of the respondent-Board in not opening the price bid cannot be faulted. Accordingly, this writ petition fails and the same is dismissed. No costs.

Dated: 27-01-2006. (B.Seshasayana Reddy,J)

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